Gimrock Construction, Inc. *and* International Union of Operating Engineers, Local Union 487, AFL–CIO. Case 12–CA–17385

June 30, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This case, which involves the Respondent's refusal to reinstate striking employees, is before the Board on remand from the United States Court of Appeals for the Eleventh Circuit. *NLRB v. Gimrock Construction, Inc.*, 247 F.3d 1307 (11th Cir. 2001). The court denied enforcement of the Board's original order requiring reinstatement and directed the Board to explain its conclusion, contrary to that of the judge, that the Union's bargaining position—in support of which the strike was conducted—did not evidence a jurisdictional objective. As explained below, after careful consideration of the record evidence, we conclude, consistent with our original decision below, that the evidence in this case fails to establish that the Union's bargaining position reflected an unlawful jurisdictional objective; consequently, we conclude that the Union did not engage in an unlawful jurisdictional strike. We begin with a recitation of the procedural history of this case, followed by a discussion of the facts and an analysis of the legal question presented.

I.

On August 27, 1998, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] In that decision, the Board affirmed the administrative law judge's dismissal of allegations that the Respondent violated Section 8(a)(5) of the Act by refusing to execute a collective-bargaining agreement, and by conditioning the attainment of an agreement on a nonmandatory subject of bargaining (specifically, a limitation on the applicability of the agreement to one project only). The Board additionally affirmed the judge's conclusion that the Respondent had violated Section 8(a)(3) and (1) by failing to reinstate economic strikers upon their unconditional offer to return to work, and adopted the judge's recommended Order requiring, inter alia, that the Respondent offer reinstatement to the strikers.

[1] 326 NLRB 401.

In that proceeding, the Respondent had asserted, as a defense to the 8(a)(3) complaint allegation, that it had no obligation to reinstate the striking employees, because they allegedly had engaged in an unprotected (and unlawful) jurisdictional strike. More specifically, the Respondent claimed that the strike had been conducted in furtherance of the demands advanced by the Union during the parties' negotiations for a collective-bargaining agreement, and that those bargaining demands were jurisdictional in nature (i.e., that the Union, through negotiations, sought to have certain work assigned to its members, rather than to other employees).

Although the judge effectively agreed with the Respondent that the Union—via its bargaining demands—had sought the reassignment of work to its members, the judge nevertheless did not accept the Respondent's contention that the strike in furtherance of that bargaining position constituted an unlawful jurisdictional strike. Essentially, the judge concluded that he lacked the authority to make a determination as to whether the employees had in fact engaged in a jurisdictional strike in violation of Section 8(b)(4)(D), based on the premise that Section 10(k) provides the exclusive procedural mechanism through which such determinations are to be made.[2]

The Board adopted the judge's conclusions that the strike at issue was an economic strike, and that the Respondent violated Section 8(a)(3) by refusing to reinstate the strikers. Accordingly, the Board also affirmed the judge's order requiring the Respondent to offer reinstatement to the strikers. Notwithstanding the Board's adoption of the judge's conclusions, however, the Board rejected certain of the judge's statements in which he effectively characterized the Union's bargaining demands as jurisdictional in nature. Specifically, the Board disavowed reliance on the judge's statements to the effect that the Union, during the course of negotiations with the Respondent, sought to have particular work ("oiler and mechanic" work) assigned exclusively to its

[2] Under Sec. 10(k) of the Act, if the Board finds that the evidence adduced at the hearing demonstrates reasonable cause to believe that Sec. 8(b)(4)(D) has been violated, the Board will issue a decision awarding the work at issue to employees represented by one of the union parties to the dispute. If the Board awards the disputed work to the employees represented by the union charged with the violation of Sec. 8(b)(4)(D) or the charged party complies with a Board decision awarding the work to other employees, the unfair labor practice charge will be dismissed; alternatively, if the charged party fails to comply with the Board's decision awarding the work to other employees, the General Counsel will issue a complaint, and the Board ultimately may find a violation.

Thus, pursuant to the framework established by Sec. 10(k), it is only after the Board makes an award of the work in dispute, and a union fails to comply with that award, that a union may be found to have violated Sec. 8(b)(4)(D).

members. The Board instead accepted the Union's claim that it simply had taken the position during bargaining that any employees performing oiler and mechanic work should be covered by the collective-bargaining agreement.[3]

Thereafter, the Board filed a petition seeking enforcement of its Order with the United States Court of Appeals for the Eleventh Circuit. On April 20, 2001, the court issued an order denying enforcement of the Board's Order. The court determined that, although the Board was permitted to reject the judge's characterization of the Union's bargaining position—as it represented one of several permissible inferences that could be drawn from the credited facts—the Board had an obligation to more clearly explain its rationale. Because the court concluded that the Board had not fulfilled that obligation, the court remanded the proceeding to the Board "for a thorough discussion of the evidence supporting the Board's determination of the Union's bargaining position and for a thorough explanation of the Board's reasons for discounting the conflicting evidence on this issue." 247 F.3d at 1312–1313.

By letter dated August 6, 2001, the Board notified the parties that it had decided to accept the court's remand and invited the parties to submit statements of position. The General Counsel, the Union, and the Respondent filed statements of position.

II.

The Board has considered the Board's original decision in light of the court's opinion and the parties' statements of position. For the reasons that follow, we find that the evidence in this case fails to establish that the Union's bargaining position reflected a jurisdictional objective.[4] Accordingly, we conclude, consistent with the Board's original decision below, that the Union did not engage in an unlawful jurisdictional strike.

A. Factual Background

The facts of this case may be summarized briefly as follows.[5] The Respondent, Gimrock Construction Inc., is a heavy civil marine construction contractor operating throughout southern Florida and the Carribean. The Respondent employs a general work force consisting of "construction specialists" and mechanics, as well as a number of operating engineers, who possess the skills necessary for the operation of much of the heavy equipment utilized in the course of the Respondent's work. With respect to the operating engineers, beginning in approximately 1987, the Union and the Respondent executed a series of 8(f) prehire agreements that set forth their terms and conditions of employment on a project-by-project basis. The Union referred operating engineers to the Respondent through its hiring hall.

In 1994, Union Business Agent Gary Waters discovered that the Respondent had been making pension and health and welfare trust fund contributions on behalf of operating engineer employees whom the Respondent had transferred to new projects, although the parties did not have a specific project agreement or other collective-bargaining agreement at those projects. Waters was concerned that the Union could incur liability as a result of those trust fund payments.[6] He therefore requested that the Respondent execute a new collective-bargaining agreement covering the operating engineers then employed by the Respondent. When the Respondent informed Waters that it would execute a project agreement only, the Union decided to petition the Board for a representation election.

Thereafter, the Union and the Respondent stipulated to an election among the employees in the following unit, which mirrored the unit description contained in the Union's standard contract:

> All equipment operators, oiler/drivers and equipment mechanics employed by the Respondent in Dade and Monroe counties in Florida, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

[3] On March 3, 1999, the General Counsel filed a motion for clarification of the Board's Decision and Order. Specifically, based on the Board's adoption of the judge's conclusion that the striking employees had made an unconditional offer to return to work, the General Counsel sought the deletion of the words "upon application" from that portion of the Board's order requiring the Respondent to reinstate the strikers. On July 27, 1999, the Board issued an unpublished order granting the General Counsel's motion, in part. The Board reaffirmed the finding that the Union had made an unconditional offer to return to work and that, consequently, no further offer was necessary to activate the Respondent's obligation to reinstate the strikers. The Board further found that, although the language used in the initial order was somewhat imprecise, the deletion of the phrase "upon application" was unnecessary, as it should have been clear to the Respondent—in light of the finding that an unconditional offer to return to work had been made—that it had an obligation to proceed with the reinstatement of the employees at issue.

[4] In reaching this conclusion, we have relied solely on the record evidence and briefs from this proceeding. That is, we have not considered—nor has any party urged us to consider—any evidence or arguments submitted in the related case, *Gimrock Construction, Inc.*, 12–CA–20173, 344 NLRB No. 112, which we additionally issue today.

[5] These facts are drawn both from the judge's decision and from uncontradicted record evidence not set forth by the judge.

[6] Sec. 302 of the Act, which prescribes limitations on financial transactions between employers and employees, and the unions that represent them, prohibits such payments in the absence of a collective-bargaining agreement. See 29 U.S.C. § 186.

The Union won the election, and the Board subsequently certified the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

Following the Board's certification of the Union on March 20, 1995, the parties commenced negotiations for a collective-bargaining agreement. At the parties' first meeting, the Union presented to the Respondent a proposed contract, which contained a recognition clause identical to the unit description contained in the Union's certification. Although the Respondent agreed to recognize the Union as the bargaining representative of the unit described in the certification, the Respondent expressed its desire to maintain the ability—consistent with its asserted past practice—to assign to its non-operating engineer employees particular work duties that the Union claimed are traditionally performed by the employee classifications contained in the Union's certification.[7] To that end, the Respondent proposed the inclusion of the following provision, designated as article IV, section 10, in the collective-bargaining agreement:

> The parties recognize that the Employer has an established past practice, essential to its economic viability, of using non-bargaining unit employees to perform work on the following type of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tug, etc.), cranes, yard cranes, derricks, derrick barges, and similar items. Notwithstanding the fact that certain of this work is listed in the wage rate provisions of this Agreement, the parties agree that the Employer may maintain its past practice as described herein without violating this Agreement or giving rise to a claim for fringe benefits. To the extent such work is performed by non-bargaining unit personnel, said work shall not be considered as falling within the provisions of this Agreement. To avoid confusion, the parties will agree to and maintain at all times a list of bargaining unit employees, which will be considered conclusive as to the identity of the employees covered by this Agreement.

In addition, the Respondent proposed the elimination of that portion of the Union's proposed contract (designated art. I, sec. 4) that provided that oiler/drivers must "be utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes." The Respondent objected to that provision on the ground that it ostensibly would require the Respondent to hire additional employees (i.e., operating engineers, who would serve as "oilers") to perform the referenced duties, which previously had been performed, at times, by its construction specialists. The Union, on the other hand, viewed the Respondent's proposals as an attempt to remove what it considered to be bargaining unit work from the certified unit. Accordingly, the Union rejected the Respondent's proposals.[8]

Thereafter, the parties met for bargaining on two additional occasions, during which they continued to debate the extent to which particular work duties and/or the employees performing those duties should be covered by any negotiated collective-bargaining agreement. Specifically, the Union continued to insist that the tasks of assembling/disassembling and moving of cranes, as well as the monitoring of specified jet pumps and the operation of power packs for vibratory hammers, should be assigned only to "oilers" or "bargaining unit" employees, while the Respondent adhered to its position that it desired to continue to assign such work as it had in the past. In addition, the parties expressed similar disagreement concerning the work to be performed by the union-referred mechanic and the field mechanics.

Ultimately, as the parties' negotiations failed to yield any progress toward an agreement on the above-described issues, the Union notified the Respondent on May 30 that it would initiate a strike if the "oiler issue" could not be resolved. The Respondent was unwilling to alter its position and, accordingly, the Union commenced a strike the next day.

Also on May 31, the Respondent's attorney and chief negotiator, Donald Ryce, sent the Union a letter that set forth the Respondent's understanding of the Union's bargaining position, as well as the Respondent's explanation for its refusal to accede to the Union's demands.[9]

[7] Although the bargaining unit described in the certification includes the classification "oiler/drivers," it is undisputed that, at the time of the Union's certification, the Respondent did not employ any persons exclusively within the category of "oiler/driver." Rather, the Respondent's practice had been to utilize operating engineers who were not otherwise occupied or, alternatively, its construction specialists, to perform the duties typically associated with oilers. As described by several union witnesses, those duties included such tasks as driving cranes, assisting with the assembly/disassembly of cranes, performing routine maintenance on cranes, and assisting crane operators in any other manner necessary to ensure the safe operation of the cranes.

With respect to the classification "mechanics" set forth in the certification, the record reveals that the Respondent employed both a mechanic referred through the Union's hiring hall, as well as several unrepresented field mechanics. Prior to the Union's certification, the union-referred mechanic performed maintenance and repair work on the heavy equipment utilized by the operating engineers; the field mechanics performed maintenance and repair work on various types of equipment including, at times, the equipment utilized by the operating engineers.

[8] Although the Union rejected the Respondent's proposed art. IV, sec. 10 as written, the Union did proffer a counterproposal which, inter alia, permitted the Respondent's use of "non-bargaining unit employees" to perform work on trucks and boats only.

[9] Ryce's May 31 letter provided, in pertinent part:

The next day, the Union's attorney contacted Ryce to inform him that the Union likely would forgo its claims regarding the operation of the power packs and jet pumps if the Respondent would agree to the Union's claims with respect to the oiler and mechanics' work relating to the cranes. Ryce indicated that he would notify the Union if the Respondent changed its position.

Despite further discussions between various representatives of the Union and Respondent, the parties were unable to reach an agreement. Accordingly, the strike continued until June 6, on which date the Union made an unconditional offer for the strikers to return to work. The Respondent, however, refused the Union's request.

B. Analysis

As explained above, the issue on remand is whether the Union engaged in an unlawful jurisdictional strike, such that the Respondent was justified in refusing to reinstate the striking employees. Significantly, the Respondent's contention that it has no obligation to reinstate the strikers is an affirmative defense. Accordingly, the Respondent bears the burden to prove that the strike was jurisdictional in nature. See *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524, 527 fn. 9 (2002), enfd. 2003 WL 21186027 (D.C. Cir. 2003). For the reasons that follow, we conclude that the Respondent has failed to satisfy that burden.

At the outset, we distinguish between a jurisdictional claim and a representational claim. In the former situation, a union seeks to have the employer assign the work to one group of employees rather than another. In the latter situation, the union seeks to have the employees who perform the work, *whoever they are*, included in the unit and covered by the contract. In the instant case, as noted above, the burden was on the Respondent to show that the strike was for a jurisdictional object. In our view, the record as a whole fails to establish that the Union's claim was jurisdictional.

As the strike at issue was conducted in furtherance of the Union's position during bargaining, our analysis necessarily must begin with an examination of the parties' negotiations. As discussed above, the parties commenced bargaining following the Board's certification of the Union as the exclusive bargaining representative of "all equipment operators, oiler/drivers, and equipment mechanics employed by the Respondent . . . ." Although the parties had stipulated to that unit description, they had not expressly agreed upon the meaning or scope of the specified unit. Accordingly, the proper interpretation of the certified unit became a primary source of disagreement during the parties' negotiations.

From the outset of negotiations, the Respondent made clear its position that the Union's certification did not alter the status quo between the parties. Essentially, the Respondent expressed the view that the certified unit should be coextensive with the prior 8(f) units represented by the Union (i.e., should encompass only those employees who had been referred through the Union's hiring hall and covered by the parties' 8(f) agreements). This position was reflected in the Respondent's contract proposals. In its first counterproposal to the Union's proffered contract, the Respondent advocated the inclusion of article IV, section 10 (see supra), which would have authorized the Respondent to continue its precertification practice of assigning particular work (including work that the Union considered work traditionally performed by "oilers") to "non-bargaining unit employees," who would not be covered by the parties' contract.[10] Significantly, this proposal additionally called for the creation of a list of employee names that would serve as the conclusive determinant as to the composition of the bargaining unit.

The Union, by contrast, sought to define the unit not in terms of particular individuals but, rather, by reference to the particular work duties performed by persons occupying the job classifications delineated in the certification.[11]

> I have described our telephone conversation of yesterday to Gimrock. Unless I misunderstood you, the Union's current position is that there is no point in meeting, and we are at impasse, unless Gimrock agrees to the language of Article I, Section 4, of the Union's standard agreement, providing that "Oiler/Drivers shall be utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes," and further agrees that, in the future, its two non-bargaining unit field mechanics will no longer work on all of the company's equipment. It was my further understanding that if the company agrees to this language, the Union is willing to meet in order to discuss such questions as whether an oiler would be required to operate the company's jet pumps and the power packs for its vibratory hammers.
>
> We feel there are several problems with the approach you have suggested. First, the company would have to agree to key Union demands without any assurance that the Union would reciprocate by backing off of its other jurisdictional claims. Second, as Gimrock does not employ any oiler/drivers, the Company would be committing to adding one or more superfluous employees to its payroll. Finally, the Union's approach, as a whole, totally disrupts the status quo by removing significant job duties from its present non-bargaining unit workforce and likely would lead to layoffs of some of these personnel.

[10] In an April 4 letter to the Union, the Respondent's attorney, Donald Ryce, expressed his understanding that the parties desired to maintain the status quo, and explained that the Respondent's proposed art. IV sec. 10 reflected the Respondent's desire to maintain its "flexibility of operations."

[11] As discussed above (see fn. 7, supra), it is undisputed that the Respondent did not employ any persons exclusively within the category of "oiler/driver" at the time of the Union's certification. Rather, it had been the Respondent's practice to utilize operating engineers who were

As explained at trial by Union Business Agent Gary Waters, the Union adopted the position that particular work—i.e., work that traditionally was performed by "oilers" and equipment mechanics, job classifications set forth in the certification[12]—constituted "bargaining unit work" within the meaning of the certification.[13]

The Respondent contends that the Union's efforts to so define the certified unit evidenced an unlawful jurisdictional objective.[14] Specifically, the Respondent asserts that, through its bargaining position, the Union inappropriately sought the reassignment of work from one group of employees (i.e., the Respondent's construction specialists, in the case of the "oiler" work, and the field mechanics in the case of the mechanics' work) to another group of employees (i.e., the union-referred employees who had comprised the former 8(f) unit).[15]

Contrary to the Respondent's assertion, and to the judge's apparent finding in the proceeding below, we do not find that the evidence establishes that the Union's bargaining position evidenced a jurisdictional objective. As explained below, the Union's bargaining positions and proposals were directed toward the objective of defining the certified unit (by reference to the work duties traditionally performed by the enumerated classifications).[16]

Although certain of the Union's proposals or statements, viewed in isolation, arguably might be ambiguous, they must be examined in the overall context of the parties' negotiations, including the Respondent's bargaining positions and the history of the parties' relationship. As described below, the positions advanced by the Union were largely influenced by, and responsive to, the Respondent's bargaining proposals. This observation is perhaps best illustrated by the Union's divergent positions—formulated in response to the Respondent's bargaining proposals—with respect to the "equipment mechanics" and the "oilers," the two certified unit classifications in dispute.

With respect to the "equipment mechanics" classification delineated in the Union's certification, the record reveals that the Union advanced the position that any work that was traditionally performed by equipment mechanics—repair and maintenance work performed on the heavy equipment utilized by the equipment operators—was "bargaining unit work" that should be covered by the parties' collective-bargaining agreement.[17] As expressed by Respondent's counsel in his May 31 letter to the Union,[18] the Respondent asserts that the Union had insisted that the Respondent's field mechanics cease performing heavy equipment repair work and, by implication, that any such work be reassigned to the union-referred mechanic. Union Agent Waters, however, specifically refuted the Respondent's characterization of the Union's position in that regard:

> I disagree with the statement that says in the future that two non-bargaining unit field mechanics will no longer work on the Company's equipment. I made no such statement. I said that their claim that these people were not in the bargaining unit and worked on small equipment and didn't do repair on heavy equipment that we covered was fine, but if in any event that they did do work on the heavier equipment . . . then they would be within the bargaining unit. . . . I made it clear to [Respondent's counsel] that we had no objection to taking these people into the bargaining unit that they already had employed . . . unless they were not going to work on bargaining unit equipment and not be mechanics under the, in the bargaining unit.

Waters' testimony plainly reveals that the Union did not oppose the Respondent's assignment of "bargaining unit work" (i.e., heavy equipment repair work) to the field mechanics. To the contrary, the Union simply sought assur-

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not otherwise occupied or, alternatively, its construction specialists, to perform the duties typically associated with oilers.

Additionally, although the Respondent employed a number of mechanics at the time of the Union's certification, there is no indication that any of them specifically were identified as "equipment mechanics."

[12] The parties seemingly were in agreement with respect to the classification of "equipment operators" contained in the certification.

[13] For example, Waters repeatedly testified that the Union believed that the transportation, assembly, and dismantling of cranes is work that traditionally is performed by oilers and, accordingly, constitutes "bargaining unit work." Similarly, Waters testified that the operation of jet pumps and power packs was "bargaining unit work," as such work also typically was performed by oilers.

In addition, Waters' testimony reveals that the Union characterized as bargaining unit work that mechanical repair work performed on the heavy equipment utilized by the equipment operators.

[14] It is well established that a dispute or claim will be considered jurisdictional if there is "either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group." *Glass & Pottery Workers Local 421 (A-CMI Michigan Casting Center)*, 324 NLRB 670, 674 (1997) (citations omitted).

[15] Although the Respondent—as well as the judge and the Board in the proceedings below—referred to the employee group to which the Union allegedly sought reassignment of the disputed work as "the Union's members," this group more accurately is characterized as the union-referred employees who had comprised the prior 8(f) unit.

[16] That is not to suggest that we endorse the Union's position with respect to the composition of the certified bargaining unit; indeed, it is unnecessary for us to reach the issue of the actual composition of the unit in this proceeding.

[17] As discussed above (see fn. 7, supra), prior to the Union's certification, both the union-referred mechanic and, at times, the field mechanics, had performed heavy equipment repair work.

[18] See fn. 9, supra.

ances from the Respondent that *if* the field mechanics in fact performed heavy equipment repair work, they would be included in the bargaining unit represented by the Union. Significantly, and notwithstanding the Respondent's above-referenced characterization of the Union's position with respect to the field mechanics, certain record testimony suggests that the Respondent, in fact, understood that the Union merely sought contract coverage for all mechanics performing heavy equipment repair work.

Following the collapse of the parties' negotiations and the Union's consequent initiation of the strike, the Respondent's vice president, Lloyd Hunt, contacted Bennie Splain, regional director for the International Union, to request his assistance in resolving the parties' asserted impasse. In describing the discussions between Hunt and Splain—as relayed to him by Splain—Waters testified that, on the subject of the mechanics, Hunt had indicated that, although he did not mind paying the Union wage rate to some of the mechanics, he did not want to pay that rate to the lesser-skilled mechanics (presumably a reference to the field mechanics). Waters' testimony in this regard conveys the impression that the Respondent clearly understood the Union to be asserting a demand for contract coverage for the field mechanics performing heavy repair work, rather than a demand for reassignment of work to the union-referred mechanic.[19]

In sum, the evidence demonstrates that the Union did not seek the reassignment of heavy equipment repair work to a specific employee or group (i.e., a jurisdictional objective); instead, the Union merely sought to ensure that any mechanics performing that work would be included in the bargaining unit (i.e., a representational objective).[20]

In contrast to its position concerning the equipment mechanics, the Union's bargaining position with respect to the employees performing "oiler" work arguably was ambiguous. Thus, Union agent Waters repeatedly testified that the Union had adopted the position that oiler work—the transportation, assembly, and disassembly of cranes, and the operation of the jet pumps and power packs—was "bargaining-unit work" which, accordingly, should be performed only by "bargaining unit employees."[21] As the record demonstrates that both the union-referred operating engineers and the Respondent's construction specialists had performed such duties prior to the Union's certification, the Union's insistence that such work be performed only by operating engineers arguably suggests that the Union may have sought the reassignment of work from a particular group of employees, i.e., a jurisdictional objective. In our view, however, the Union's position with respect to the oiler work cannot be viewed in isolation but, rather, must be examined in the overall context of the Union's certification and the ensuing negotiations including, significantly, the Respondent's bargaining proposals.

As set forth above, the Respondent, from the commencement of the negotiations, expressed the position that the Union's certification did not alter the status quo between the parties. The Respondent, therefore, harbored some concern that the Union's effort to define the certification in terms of the work duties traditionally performed by "oilers/drivers" would compromise its ability to continue to utilize its construction specialists to perform such duties or, at a minimum, would subject it to the constraints of the parties' collective-bargaining agreement. Accordingly, the Respondent proposed the addition of a new contract provision, designated article IV, section 10. In relevant part, that provision authorized the Respondent to continue its prior practice of using "non-bargaining unit" employees to perform various

[19] Although Lloyd Hunt appeared as a witness at the hearing before the administrative law judge, he did not contradict Waters' testimony, nor did he otherwise testify concerning the specific substance of his conversations with Splain.

[20] Board precedent establishes that when the focus of a dispute is whether a union (or which of two unions) represents a group of employees performing particular work, the dispute is representational—rather than jurisdictional—in nature. See, e.g., *Carpenters Local 275 (Lymo Construction)*, 334 NLRB 422 (2001); *Glass & Pottery Workers Local 421 (A-CMI Michigan Casting Center)*, 324 NLRB 670, 674 (1997); *Teamsters Local 222 (Jelco)*, 206 NLRB 809 (1973).

[21] Although the witnesses' usage of the terms "bargaining unit" and "non-bargaining unit" was rather imprecise and, at times, somewhat ambiguous, it appears that both parties generally understood those terms to mean, respectively, the union-referred employees (operating engineers) who had comprised the former 8(f) units, and the Respondent's construction specialists and field mechanics. For example, Waters testified that the Union adopted the position that crane transportation constituted bargaining unit work, for which the Respondent should utilize an equipment operator, front-end loader, etc. Additionally, in response to Attorney Ryce's question as to whether the Union had taken the position that the Respondent should utilize operating engineers to run the jet pumps and power packs for the laboratory hammers, Waters answered in the affirmative.

The record reveals that, initially, the Union insisted that only "bargaining unit employees" could perform the crane-related oiler work and the jet pump/power pack work. Subsequently, however, as both parties concede, the Union, in an effort to facilitate an agreement between the parties, offered to "relent on its demands" for the jet pump and power pack work. Specifically, Waters testified that, during a telephone conversation on the day preceding the strike, he advised Ryce that the Union would give up its claim that the jet pump and power pack work constituted bargaining unit work, if the parties could reach an agreement with respect to the remaining oiler and mechanic work.

Additionally, both parties agree that the Union thereafter extended an offer to the Respondent, authorizing it to utilize nonbargaining unit employees to perform jet pump and power pack work, and to treat them as "oilers under the contract only for those hours." Although the parties are not in agreement as to the timing of the Union's offer, resolution of that issue is not critical to our analysis.

work duties (seemingly including those identified by the Union as tasks that traditionally were performed by oilers), and concomitantly provided that such work would not be deemed to be covered by the contract when performed by those nonunit employees.[22]

In our view, the Respondent's proposal appears to have foreclosed or rendered futile the position that the Union had expressed with respect to the equipment mechanic classification—that the certification conferred on the Union the right to represent all employees performing the designated work duties.[23] Indeed, the Respondent's proposal specifically provided that construction specialists performing various designated duties (including, seemingly, the transportation, assembly, and disassembly of cranes, as well as the operation of the jet pumps and power packs) would not be deemed to be covered by the terms of the parties' agreement. For that reason, the Union was compelled to pursue an alternative means to achieve its objective of defining the oiler/driver classification and retaining oiler work within the certified unit.[24] Under these circumstances, we cannot conclude that the Union's effort to persuade the Respondent, first, to utilize other identified bargaining unit members (e.g., equipment operators) to perform the designated oiler work and, thereafter, to provide contract coverage for nonbargaining unit employees during the times in which they performed that work, in the final analysis, evidenced a jurisdictional objective.

Significantly, this case does not present the situation in which a union simply asserts an unsubstantiated demand for work that is being performed by nonunit employees and that had never been performed by unit employees. Rather, the Union's claim to the above-described work arose in the context of collective bargaining, through which the parties had endeavored to resolve the ambiguity in the bargaining unit classifications for which the Union had recently been certified.[25] In this context, we find support for our conclusion that the Union's conduct was not unlawful in the proviso to Section 8(b)(4)(D) which, in pertinent part, provides that a union may engage in 8(b)(4) conduct if an employer "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." 29 U.S.C. § 158(b)(4)(D).

Finally, our conclusion that the Union's position in this case was not definitively jurisdictional in nature is consistent with the Board's decisions in other contexts. See, e.g., *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 827 (2003) (even where a union's conduct literally may satisfy the definition of the proscribed activity in Sec. 8(b)(4)(D) of the Act, "the Board nevertheless will examine the nature and origins of the dispute to determine whether it is actually jurisdictional").

Accordingly, for all the foregoing reasons, we conclude that the Respondent did not satisfy its burden to establish that the Union engaged in an unlawful jurisdictional strike.[26]

ORDER

The National Labor Relations Board reaffirms the Board's original Decision reported at 326 NLRB 401 (1998), as clarified by this opinion and by the Board's Order dated July 27, 1999, see fn. 3, supra, and orders that the Respondent, Gimrock Construction, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[22] In that regard, the proposal additionally provided for the creation of a list of employee names that would serve as the conclusive source for identification of the employees comprising the bargaining unit.

[23] Indeed, the record evidence suggests that, absent the Respondent's proposals, the Union likely would have maintained a consistent position with respect to the oiler classification. On more than one occasion, Waters testified that the Union believed that, as of the date of the Union's certification, those "non-bargaining unit" employees who were performing oiler work "were bargaining unit people if they performed that work."

[24] From the Union's perspective, the Respondent's proffered contract proposals represented improper attempts to remove "bargaining unit work" from any negotiated agreement. Indeed, Union Agent Waters explained that the Union's concern with the Respondent's proposed art. IV, sec. 10 of the collective-bargaining agreement was that "it excluded most of the bargaining unit work from the contract, if not all."

[25] Moreover, the parties were in agreement that at least some of the employees who had performed the disputed oiler and mechanics' work prior to the Union's certification were included in the certified bargaining unit.

[26] In light of this conclusion, we need not reach the issue of whether a respondent properly may allege an 8(b)(4)(D) violation as a defense to a complaint alleging a failure to reinstate striking employees in violation of Sec. 8(a)(3). Similarly, we do not pass on the judge's conclusion that the procedural framework embodied in Sec. 10(k) of the Act precludes a ruling on the merits of such a defense.